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No. 93-1546

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

WILLIAM RAY,

Petitioner,

v.

PEABODY INSTITUTE OF THE JOHNS HOPKINS UNIVERSITY, CONSERVATORY OF MUSIC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does a conflict exist with this Court's holding in *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), and subsequent holdings of federal courts of appeals where the Fourth Circuit sustained summary judgment in favor of Respondent based on Petitioner's failure to establish a prima facie case of race or age discrimination in employment and where Petitioner failed to rebut Respondent's legitimate, nondiscriminatory reasons for its employment action?

2. Does a conflict among the circuits exist where the Fourth Circuit sustained summary judgment for Respondent based on its determination that Petitioner failed to establish a prima facie case of age discrimination despite Petitioner's proffered statistical evidence?

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Respondent, Peabody Institute of The Johns Hopkins University, Conservatory of Music, hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

Petitioner, William Ray, is a sixty-seven year old African-American man who, since July 1982, has been a voice instructor at Respondent Conservatory, a degree granting

music division of The Johns Hopkins University. (J.A. 12; 111-12 at ¶ 8.) Petitioner was hired as a performance or studio faculty member in Respondent's voice department to train students to become professional performers. (J.A. 108-09 at ¶ 4.) Respondent employs one hundred and forty (140) faculty members, one hundred and five (105) of whom are aged forty or older, and thirty-five of whom are under the age of forty. (J.A. 373-74 at ¶ 7.) In 1991, Respondent Conservatory hired three part-time voice faculty members, all of whom were over the age of fifty. (J.A. 122-23 at ¶ 18.)

Since joining Respondent's voice department in 1982, Petitioner has worked under a series of one-year contracts. Like every other performance faculty member, Petitioner's salary was dependent upon his ability to attract, enroll and maintain a full complement of students in his studio. (J.A. 116-17 at ¶¶ 12 and 13.) Respondent defines a full complement of voice students to be twelve to fourteen student majors. (J.A. 624-26; 694-95.) Unlike all other faculty, Petitioner was paid for a number of years an additional $5000 each year to recruit minorities for Respondent Conservatory. (J.A. 088-89; 126 at ¶ 22; 670-71; 1045.)

Faculty compensation has always been tied to studio enrollment. (J.A. 117 at ¶ 13.) Thus, the number of students who become affiliated with a particular faculty member's studio has a significant impact financially on that faculty member as well as Respondent. Since the time Petitioner joined its faculty, Respondent has maintained consistently an approach to studio assignments which offers applicants an opportunity to indicate their first and second preferences for studio placement. If the

student's first choice of major instructor is willing to accept and has available studio space for the student, the student is assigned to that faculty member's studio. If that faculty member either has no space or is not interested in teaching that student, assignment is then made to the student's second preference, provided that faculty member accepts the student and has studio space available. (J.A. 759-60; 109-10 at ¶ 6.)

Recognizing that a faculty member's ability to attract students is related to that faculty member's reputation as a performance artist or a teacher, Respondent frequently gives new faculty several years to obtain a full studio. Eileen Tate Cline, a fifty-seven year old African-American and Dean of the Conservatory, advised Petitioner in May of 1985 that, beginning with the 1985-1986 academic year, his salary would reflect the actual number of students in his studio. (J.A. 088-89; 117-18 at ¶¶ 13 and 14; 125-26 at ¶ 21; 632-47.) Petitioner enrolled twelve students in his studio for the 1985-1986 academic year. Petitioner's studio enrollment then dropped to ten in 1986-1987, to seven in 1987-1988, and to six in 1988-1989. (J.A. 763-79; 822-43; 111-12 at ¶ 8.) Based in part on Petitioner's low enrollment history, Dean Cline recommended in March of 1988 that Petitioner's contract not be renewed effective July 1, 1989. Upon the University Provost's request, the nonrenewal decision was held in abeyance, and no action was thereafter taken on the recommendation. (J.A. 712-13; 115-16 at ¶ 11.) Petitioner's contract was thereafter renewed for the 1989-1990 academic year, as well as for each of three subsequent academic years. (J.A. 780-85; 841-44; 872; 111-12 at ¶ 8; 1094-096.)

During the 1989-1990 academic year, a specially convened State task force directed that Respondent control its expenditures. As a result of the State task force's review, Respondent adopted new faculty salary guidelines in March 1990. The four-step formula contained in the guidelines tied faculty compensation directly to an instructor's studio enrollment and not to the quality of the students or the quality of instruction.[1] The new salary guidelines were applied retroactively to all faculty employed for more than two years. However, even though Petitioner had notice in March of 1988 of nonrenewal of his contract and had failed to achieve a full complement of students in the academic years of 1986-1987 and 1987-1988, Petitioner's salary for 1990-1991 was not reduced by the full amount permitted under the salary guidelines. (J.A. 698-704; 114-15 at ¶ 10; 118-21 at ¶ 15.)

Also during the 1989-1990 academic year, Dean Cline made another policy change which affected the calculation of faculty salaries. Prior to 1989, admitted students who did not indicate a studio preference were assigned to studios. Petitioner was assigned more "no preference" students than any other faculty member. However, in 1989-1990, Respondent began allowing admitted students who had not initially noted a faculty studio preference to select their faculty studio from among those faculty members with studio space available. The policy change maximized prospective students' control over their studio placements and resulted in an increased number of

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[1] The four-step formula for calculating faculty salaries was set out in the Fourth Circuit's opinion. (Pet. Appendix at p. 3a.)

admitted students who chose to enroll at Respondent Conservatory. (J.A. 109-14 at ¶¶ 6, 7, and 9.)

Throughout this time period and thereafter, Petitioner's studio enrollment continued to drop. Six students enrolled in Petitioner's studio during the first semester of the 1989-1990 academic year; that number fell to five during the second semester. The following academic year of 1990-1991, seven students were enrolled in Petitioner's studio, and that number fell to six during the second semester. (J.A. 780-82; 111-12 at ¶ 8; 1035-038.) Under the new faculty salary guidelines, Respondent reduced Petitioner's salary by 5% in 1990-1991, by 50% in 1991-1992, and in 1992-1993, converted him to part-time status and paid him on an hourly basis. (J.A. 118-21 at ¶ 15.)

Since their adoption in 1990, the new salary guidelines have been applied uniformly to all of Respondent's instructors. The salaries of twelve other instructors were also reduced under these guidelines. It was undisputed that eleven of those twelve other faculty members were white. The ages of those whose salaries were reduced ranged from thirty-one to sixty-three. (J.A. 118-21 at ¶ 15.) Of the seventeen faculty members who were affected by the guidelines in the 1990-1991 academic year, all but four, through their own efforts, brought their studio enrollments back up to expected levels by the end of the 1991-1992 academic year. Of the four instructors who failed to bring their enrollments back up to expected levels, one has left Respondent Conservatory and two, like Petitioner, were reduced to part-time, hourly status. (J.A. 121-22 at ¶ 16; 374 at ¶ 8.)

After investigating Petitioner's charges of race and age discrimination, the Maryland Commission on Human Relations rendered a determination of no probable cause of discrimination which was upheld on reconsideration. (J.A. 094-98; 100.) On January 7, 1992, the Equal Employment Opportunity Commission concurred with the Maryland Commission's findings and determination. (J.A. 102-03.)

Petitioner then initiated a law suit in the United States District Court for the District of Maryland, alleging that Respondent's adjustments to his salary were made on the basis of his race and age in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* (J.A. 011-16.) The district court held that Petitioner failed to establish a prima facie case of discrimination and granted summary judgment in favor of Respondent. (Pet. Appendix at p. 21a.) The Fourth Circuit, finding that Petitioner's salary reduction was not the result of discrimination, upheld summary judgment. (*Id.* at p. 8a.)

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied on the following grounds: 1) the decision below does not conflict with this Court's holding in *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), with respect to the burden of proof allocated to a plaintiff alleging discrimination in employment based upon race and age; and 2) the Fourth

Circuit properly found Petitioner's proffered statistical evidence of age discrimination legally insufficient.

I. The Fourth Circuit Properly Found Petitioner's Evidence Of Race And Age Discrimination Insufficient To Withstand Summary Judgment, And Its Decision Below Does Not Conflict With Prior Holdings Of This Court.

Petitioner seeks a writ of certiorari to resolve a purported conflict between the ruling below and this Court's recent decision in *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), as well as recent decisions of other federal circuit courts, concerning the proper burden of proof required of a plaintiff alleging discrimination in employment based on race and age. (Pet. at p. 16.) No conflict of decisions exists, and Petitioner's claims alleging such a conflict are spurious.

Petitioner contends that the decision below "continues a line of decisions" in conflict with holdings of this Court and those of various federal courts of appeals. (Pet. at pp. 15-16.) The thrust of Petitioner's argument is that the Fourth Circuit erroneously requires the plaintiff in a discrimination case to present evidence of discrimination *in addition to* that required to establish both a prima facie case and that the defendant's reasons for the adverse employment action were pretextual. Petitioner's contention finds no support in the case decided below or in the precedents of the Fourth Circuit.

Petitioner concludes that this Court's holding in *Hicks* does not require him to produce additional evidence beyond that presented to establish a prima facie

case to rebut the reasons advanced by his employer. (Pet. at p. 19.) However, precedents of this Court reveal the fallacy of Petitioner's conclusion. *Hicks* stands for the proposition that a factfinder may infer discriminatory motive only when the articulated reasons of the employer are disbelieved *and* when the plaintiff has presented evidence sufficient to support a finding that the employment decision was based on impermissible race or age discrimination. *Hicks*, 113 S. Ct. at 2749.

Petitioner attempts to liken the evidentiary aspects of this case with those which existed in *Hicks*. Petitioner simply may not ignore the unassailable fact that in *Hicks* this Court was presented with a situation factually distinct from that presented below. This Court granted certiorari in *Hicks* following a full bench trial before the district court. *Hicks*, 113 S. Ct. at 2746. The plaintiff in *Hicks* presented evidence sufficient to establish his prima facie case. *Id.* at 2747. The defendants therein then articulated two legitimate, nondiscriminatory reasons for their employment actions. *Id.* Hicks persuaded the distict court to reject the defendants' proffered reasons. *Id.* at 2748. At this point in the *McDonnell Douglas* scheme, Hicks was not required to produce additional evidence to prove intentional discrimination because the fact that the defendants' reasons were disbelieved, together with the prima facie elements, permitted the factfinder to infer intentional discrimination. *Id.* at 2749.

The case that Petitioner presents to this Court stands in stark contrast to that presented in *Hicks*. Unlike the discriminatory termination claim presented in *Hicks*, Petitioner advanced below a claim of disparate treatment in the setting of his salary. The Honorable John R. Hargrove

of the United States District Court for the District of Maryland held that to establish a prima facie case, Petitioner must show that he was employed by Respondent, that he was a member of a protected class, and that he was treated differently with respect to some condition of employment from others outside his class in a manner that created an inference of discrimination. (Pet. Appendix at p. 16a.) Judge Hargrove granted Respondent's motion for summary judgment, concluding that Petitioner "ha[d] not established a prima facie case of unlawful discrimination" based on race or age. (Pet. Appendix at p. 21a.) *See Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1317 (4th Cir. 1993), discussed *infra* at pp. 12-13.

After reviewing all of the evidence and construing all material factual disputes and reasonable inferences therefrom in Petitioner's favor, Judge Hargrove determined that Petitioner offered "no evidence" to undermine Respondent's assertion that "other faculty, regardless of race or age, had their salaries reduced under the 1990 guidelines." (Pet. Appendix at p. 16a.) Indeed, it was undisputed that twelve other faculty members (eleven of whom were white) had their salaries reduced under the guidelines because of their inability to maintain a full complement of students in their studios. (*Id.*) The ages of the twelve other faculty members ranged from thirty-one to sixty-three. (*Id.*) Thus, Petitioner failed to make the required showing that his salary was reduced " 'under conditions which, more likely than not, were based upon impermissible racial considerations.' " *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1286 (4th Cir. 1985) (quoting *Young v. Lehman*, 748 F.2d 194, 196 (4th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985)). Judge Hargrove found it

unnecessary to consider whether Respondent's salary guidelines presented a legitimate, nondiscriminatory reason for Petitioner's reduction in salary or whether application of the salary guidelines was a pretext for unlawful discrimination. (Pet. Appendix at p. 21a.) Thus, Petitioner's reliance on the holding of *Hicks* is misplaced, since *Hicks* is inapplicable on the facts of this case.

There is no support for Petitioner's conclusion that the Fourth Circuit somehow required him to satisfy a more onerous evidentiary burden than that described in *Hicks* to rebut Respondent's articulated reasons for its employment action. Even assuming, as Petitioner does,[2] that he established his prima facie case, the Fourth Circuit, in affirming the district court's grant of summary judgment, concluded that Respondent's salary guidelines were "a sound educational policy born not of racial design, but of a genuine interest in achieving the highest academic standards possible during a period of financial austerity." (Pet. Appendix at p. 5a.) The Fourth Circuit recognized that the record reflected an "even-handed" application of Respondent's salary guidelines. (*Id.*) Moreover, the Fourth Circuit stated that Petitioner had "no evidence whatsoever" to support his allegation that Respondent had manipulated student assignments in an effort to minimize the number of students enrolled in his studio. (*Id.* at p. 6a.)

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[2] Petitioner states not only in his "Questions Presented" but also in his argument that he established a prima facie case of race and age discrimination. (Pet. at p. 20.) The district court below held that Petitioner had *not* established a prima facie case of unlawful discrimination. (Pet. Appendix at p. 21a.)

The holding in *Hicks* makes clear that once the defendant has articulated legitimate, nondiscriminatory reasons to rebut the *McDonnell Douglas* presumption, the plaintiff's proffer of admissible evidence to establish that presumption remains for consideration, together with any other evidence which the plaintiff presents to show that the employer's reasons are a pretext for race or age discrimination. *See Mitchell*, 12 F.3d at 1317. At this point of the *McDonnell Douglas* analysis, it was incumbent on Petitioner to come forward with evidence sufficent to rebut Respondent's nondiscriminatory reasons. *Hicks*, 113 S. Ct. at 2749, 2752, 2754. Thus, to survive summary judgment, Petitioner was required to sustain his burden of proof and present evidence sufficient to create a genuine dispute of material fact with respect to Respondent's nondiscriminatory explanation. This he failed to do. The court found no basis upon which to infer intentional discrimination based on either race or age. (Pet. Appendix at p. 7a.) Accordingly, the Fourth Circuit properly affirmed summary judgment in Respondent's favor.

Petitioner refers the Court unnecessarily to a number of cases which he claims supports his assertion that a conflict exists among the federal courts of appeals on this evidentiary issue. All but two of the cases upon which Petitioner relies were decided prior to the decision in *Hicks*. Petitioner's reliance on these decisions is misplaced. This Court granted certiorari in *Hicks* to resolve the "divergent views" of the federal courts of appeals with regard to the evidentiary burdens in discriminatory treatment cases brought pursuant to Title VII. *Hicks*, 113 S. Ct. at 2746, 2750. Circuit court decisions rendered prior to the ruling in *Hicks* which conflict on this issue are

completely irrelevant to this Court's determination of whether a writ of certiorari should be granted in this case.

Petitioner further contends that the First Circuit, like the Fourth Circuit, erroneously requires what Petitioner refers to as a "prima facie plus" evidentiary burden. The First Circuit's discussion of the issue in *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1398 (1994), makes it clear that it properly applied *Hicks*. There the First Circuit stated that, in reaching a decision on the ultimate question of discriminatory intent, the factfinder may:

> consider, along with other evidence, the evidence put forward to show that the employer's justification for its adverse employment action was a pretext. . . . Such evidence, coupled with the elements of the employee's prima facie case (and, of course, any other evidence), may (or may not) lead the factfinder to infer that the employer has engaged in intentional discrimination.

Id. at 843 (internal citation omitted).

A recent opinion of the Fourth Circuit in a discriminatory treatment case illustrates not only that court's adherence to the ruling in *Hicks* but, further, that summary judgment was properly sustained below. In *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, the Fourth Circuit concluded that summary judgment in favor of the defendant employer was justified by the plaintiff's failure to establish his prima facie case and to carry his ultimate burden of persuasion in response to the defendant's proffered nondiscriminatory explanation. *Id.* at 1318. Following the

shifting burdens analysis described in *Hicks*, the court stated that once the employer meets its burden and rebuts the prima facie presumption of intentional discrimination, the evidence presented to establish a prima facie case "remains in the case, together with any evidence presented to show that the employer's explanation was untrue or pretextual." *Id.* at 1317. A court must then consider all of the evidence to determine whether the plaintiff has satisfied his "ultimate burden of proving that the employer intentionally discriminated" against him on the basis of age and that age was "a determinative factor in the adverse employment decision." *Id.* Summary judgment is warranted where the plaintiff fails either to establish a prima facie case or, if so established, to show a genuine factual dispute with respect to the employer's legitimate, nondiscriminatory explanation.[3] *Id.*

Similarly, Petitioner's reference to the Fourth Circuit decisions in *Wileman v. Frank*, 979 F.2d 30, 33, 38 (4th Cir. 1992), and *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990), both of which were rendered prior to *Hicks*, does nothing to buttress his assertions. A careful reading of those decisions reveals nothing which conflicts with the holding in *Hicks*. Indeed, the decisions in *Wileman* and *Spencer* only serve to reinforce the inescapable conclusion that the decision below does not conflict with the prior holdings of this Court.

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[3] *See also LeBlanc*, 6 F.3d at 843 (direct or circumstantial evidence may suffice, but the evidence as a whole must be sufficient to permit a reasonable factfinder to infer that age discrimination motivated the employer's decision).

Because the decision below does not conflict with the reasoning in *Hicks* or with subsequent decisions rendered in various federal circuit courts, certiorari is not warranted on this question.

II. The Fourth Circuit's Basis For Concluding That Petitioner's Statistical Evidence Was Legally Insufficient Is Not In Conflict With Decisions Of Other Courts Of Appeals.

Petitioner also seeks a writ of certiorari to resolve a perceived conflict among the federal circuit courts on the issue of whether statistical evidence from small employee groups, in addition to other evidence, is sufficient to withstand a motion for summary judgment on a claim of age discrimination under the ADEA. (Pet. at p. 21.) Since there is no conflict among the circuit courts that has any relevance to this issue, the petition should be denied.

Initially, it should be noted that the full extent of Petitioner's ADEA claim below, both before the Equal Employment Opportunity Commission and the federal district court, was that one of the effects of Respondent's application of the salary guidelines would be to deny him lifetime medical benefits. (J.A. 014 at ¶ 17; 091.) However, Petitioner admitted that since he has met the age-plus-years-of-service requirement, he is fully vested with these benefits and was never excluded from receiving them as a result of Respondent's salary guidelines. (J.A. 893-900.) In fact, Respondent presented evidence that it purposefully employed Petitioner for an additional year so that he could vest and obtain those benefits. (J.A. 127 at ¶ 24.)

Based on the record below, Petitioner had no basis for a claim of age discrimination.

Petitioner again sets forth various numbers which he purports to be statistical evidence that Respondent's salary guidelines disproportionately affected members of his protected age group. (Pet. at p. 21.) Petitioner finds fault with the Fourth Circuit's decision because that court found his statistical and other evidence insufficient to withstand a motion for summary judgment. (*Id.*) However, Petitioner's implied assertion that the Fourth Circuit's failure to find his alleged statistical evidence significant somehow created a conflict among the courts of appeals is unsupportable.

Petitioner fails to demonstrate how a conflict of any sort exists among the circuit courts on the significance of statistical evidence in a discrimination case. In support of his assertions, Petitioner makes the bald declaration that the Fourth Circuit requires plaintiffs asserting age discrimination claims "to produce large statistical samples" to establish a prima facie case and show pretext. (Pet. at p. 24.) Yet, Petitioner neglects to refer this Court to a single legal authority or to any portion of the Fourth Circuit's opinion in this case in support of this assertion.

Further, Petitioner relies on decisions of various federal circuit courts which purportedly hold that "statistical evidence from small employee groups combined with other evidence is sufficient to withstand a motion for summary judgment." (Pet. at p. 21.) The case law upon which Petitioner relies does not stand for such a proposition. Rather, Petitioner refers this Court to decisions which involved factual determinations of discrimination

based on the grossly disproportionate numbers of individuals within the protected age group who were affected by the employment decision as opposed to those outside of the protected group. *See, e.g., Lindsey v. Prive Corp.*, 987 F.2d 324, 328 (5th Cir. 1993) (all three of defendant's waitresses/dancers who were over forty were dismissed at the same time); *Maresco v. Evans Chemetics*, 964 F.2d 106, 113 (2d Cir. 1992) (in allocating post-consolidation employment positions, decision to terminate two of three older accounting employees and none of twenty younger employees gave rise to inference of age discrimination); *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245 (7th Cir. 1992) (performance program terminated eleven employees – ten of twenty-seven employees within protected age group and one of twenty-five employees outside protected age group); *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 49 (1st Cir. 1990) (evidence showed that a group of four or five employees over forty were discharged and replaced within two years by people under thirty; officer of defendant corporation expressed view that some of plaintiff's subordinates should be discharged because of poor performance due to age; and a retirement inducement package was aimed at employees over fifty-eight).

It has been held that to create an inference that the defendant discriminated against individual members of a protected class, *appropriate* statistical evidence "must show a *significant* disparity and eliminate the most common nondiscriminatory explanations for the disparity." *Barnes v. GenCORP Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990) (emphasis added). The Fourth Circuit has stated that the defendant in a Title VII case

bears the burden of rebutting the plaintiff's statistical evidence "*when* the plaintiff's statistics establish a prima facie case." *Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1303 (4th Cir. 1984) (emphasis in original). Simply because a plaintiff proffers statistical evidence does not mean that plaintiff is automatically entitled to a presumption that a prima facie case has been etablished without any scrutiny of those statistics. *Id.* at 1304. Instead, a plaintiff must demonstrate to the court that his statistical comparisons are meaningful. *Id.*

Petitioner claims to have presented the courts below with significant statistical evidence sufficient to prove a prima facie case of age discrimination under *McDonnell Douglas*. (Pet. at p. 23.) In this connection, Petitioner states that of the thirteen instructors who were adversely affected by Respondent's salary guidelines, all but one were within the protected age group. (*Id.* at pp. 21-23.) However, this statistic is insignificant in view of the composition of Respondent's faculty.[4] Indeed, Respondent employs one hundred and forty (140) instructors, seventy-five percent (75%) of whom are within the protected age group.[5]

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[4] It should be noted that *after* the salary guidelines went into effect, Respondent hired three part-time faculty members for the voice department. All three individuals were over the age of fifty at the time they were hired in 1991. (J.A. 123-24 at ¶ 18.)

[5] Petitioner misstated this fact in his "Questions Presented." There, Petitioner incorrectly stated that 25 percent of Respondent's employees were over the age of forty. (J.A. 373-74 at ¶ 7.)

Petitioner is required to do more than offer a few numbers as evidence of age discrimination. None of the "other evidence" that Petitioner claims to rely upon has any relevance to the triggering of Respondent's salary guidelines. It is not relevant that Petitioner's students were successful and that Petitioner was a competent instructor. (Pet. at p. 23.) Moreover, the 33-year-old, part-time faculty member to whom Petitioner makes reference (*Id.*), was an African-American hired *prior to* Respondent's adoption of the new salary guidelines. (J.A. 122-23 at ¶ 17.) Respondent's salary guidelines were triggered when Petitioner failed to meet Respondent's student enrollment requirements. Moreover, Petitioner has failed to show either this Court or the courts below how his statistical evidence is either appropriate or significant. Petitioner failed to offer any expert testimony on the significance of his statistics. Absent such a showing, the Fourth Circuit properly found Petitioner's evidence insufficient to establish a prima facie case of age discrimination.

Finally, even assuming that Petitioner's statistical evidence, combined with his other evidence, was sufficient to establish a prima facie case, the Fourth Circuit concluded that Respondent's implementation of the faculty salary guidelines was a legitimate business decision to control expenditures. (Pet. Appendix at p. 5a.) Indeed, the Fourth Circuit stated that Respondent's "enrollment-based compensation plan" was an "entirely legitimate effort to constrain costs by rewarding competence." (Pet. Appendix at p. 8a.) Neither Title VII nor the ADEA "require an employer to adopt a life of economic altruism

and thereby immunize protected class members from discharge or demotion despite their poor performance . . . ." *Gairola*, 753 F.2d at 1287.

The Fourth Circuit weighed Petitioner's evidence in its entirety and found it to be insufficient to prove that Respondent discriminated against him based on his age. Since Petitioner failed to show the significance of his statistical evidence in support of his age discrimination claim, the Fourth Circuit was warranted in affirming the district court's grant of summary judgment, and its holding creates no conflict among the circuit courts. Thus, certiorari is not justified on this question.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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